

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 12, 2006

STATE OF TENNESSEE v. MARIO PISANI
Appeal from the Criminal Court for Rutherford County
No. F-55758 Don R. Ash, Judge

No. M2006-00550-CCA-R3-CD - Filed March 8, 2007

The defendant, Mario Pisani, was convicted of seven counts of rape of a child, seven counts of rape, seven counts of aggravated sexual battery, eight counts of sexual battery by an authority figure, and seven counts of incest. The defendant was sentenced to an effective sentence of forty-two years in prison. The defendant appeals his convictions. We affirm the trial court's convictions and sentence.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Gerald L. Melton, District Public Defender; John Driver, Assistant District Public Defender, for the appellant, Mario Pisani.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Laurel Nutt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On July 7, 2004, a Rutherford County grand jury indicted the defendant, Mario Pisani, on seven counts of rape of a child, seven counts of rape, eight counts of aggravated sexual battery, fourteen counts of sexual battery by an authority figure, seven counts of incest, and seven counts of statutory rape.

Prior to trial, the defendant, who was married to the victim's mother between 2001 and 2003, filed a motion with the Rutherford County Criminal Court giving notice of his intent to use evidence of the victim's prior sexual behavior at trial. The defendant stated that he wished to introduce evidence of the victim's sexual behavior in order to demonstrate her sexual knowledge, specifically "her language, her mannerisms, and her being able to express what happened to her." Specifically, the defense wished to introduce evidence regarding alleged incidents of sexual assault against the

victim, J.M., by one Kenneth Holt. The victim testified at the pre-trial hearing that the incidents involving Holt took place at least a year after the defendant performed the same acts upon her and that she gained knowledge of these sexual acts from the defendant and not Holt. She also testified that a boy of her age group had digitally penetrated her at a movie theater and that she had sexual intercourse with her boyfriend in September 2003. Pursuant to Rule 412 of the Tennessee Rules of Evidence, the trial court ruled that the defendant could only ask the victim limited questions about her prior sexual history. The court ruled that the defendant could ask the victim whether she had engaged in specific sex acts with other men and whether those events occurred before or after the events involving the defendant; the defendant could not ask the names of these other men, the number of times these events took place, and whether the victim consented, as these facts were not relevant to the victim's sexual knowledge. The case then proceeded to trial.

At trial, the victim testified that in April 1999, after the defendant had moved into the house with the victim and her mother, the defendant abused her for the first time. The victim stated that she was nine years old at the time. On that occasion, the defendant had the victim remove her clothing and he removed his own clothes before fondling the victim's breasts and digitally penetrating her. A few weeks later, the defendant called the victim into his bedroom, where he was watching pornography. The defendant had the victim remove her clothes; while viewing the naked victim, the defendant masturbated and ejaculated onto her stomach.

When the victim was eleven, the defendant was alone with the victim at his tattoo shop. He again felt her breasts, digitally penetrated her, and masturbated. On this occasion, the defendant ordered the victim to perform fellatio on him, which she did. On another occasion, when the victim was twelve, the defendant ordered the victim to fellate him while they rode in his vehicle. The defendant also fondled the victim's breasts at that time. Following that incident, the defendant gave the victim twenty dollars.

The victim testified that the defendant sexually assaulted her on three other occasions while the victim was twelve. On one occasion, the defendant fondled the victim's breasts and digitally penetrated her while he masturbated. On another occasion, the defendant asked the victim to manually stimulate his penis. On another occasion, the defendant penetrated the victim with a vibrator.

The abuse continued after the defendant married the victim's mother in 2001. While the victim's mother was at work, the defendant engaged the now thirteen-year-old victim in simultaneous oral sex, which the defendant explained to the victim was commonly called "sixty-nine." The victim testified that she did not know the meaning of this term before the defendant explained the meaning to her. On another occasion, the defendant sexually assaulted the victim while her mother was away at a birthday party. The victim testified that the defendant also, on one occasion, offered the victim money to let him have intercourse with her. The victim testified that she did not tell anyone about these incidents until November 16, 2003, after the defendant and the victim's mother divorced. The victim said she kept quiet out of fear over what the defendant might do if she revealed what had happened to her.

The victim testified that she observed a small mole on the defendant's penis during one of the sexual encounters with the defendant. A photograph of the defendant's penis introduced into evidence at trial indicates the existence of a mole similar to one described by the victim. The defendant's mother, Jeanette Harrison, testified that the victim's mother mentioned the mole to Harrison while Harrison prepared Thanksgiving dinner. Harrison claimed that the victim may have found out about the mole that way, though Harrison was unsure as to whether the victim, who was in another room at the time, overheard the conversation. Harrison also testified that the victim's mother had not expressed any concern regarding inappropriate sexual activity by the defendant during their marriage. The defendant, testifying in his own defense, stated that he had never engaged in inappropriate sexual activity with the victim.

After the defendant testified, the state called the victim's mother as a rebuttal witness. The state's attorney had earlier asked Harrison whether she had threatened the victim's mother by stating that the defendant should have killed the victim's mother when he had the chance. Harrison stated that she made no such threat. Over the defendant's objection, the victim's mother testified that Harrison had, while both women were in an elevator following one of the trial sessions, told the victim's mother "He [the defendant] should have killed you when he had a chance, you bitch." The victim's mother also claimed that Harrison said "you're nothing but a lying whore and your daughter is a first-class slut." After the two women exited the elevator, the victim's mother claimed that Harrison "flipped off" the victim's mother and said, "Smile, you're on *Candid Camera*, bitch."

The jury found the defendant guilty on seven counts of rape of a child, seven counts of rape, seven counts of aggravated sexual battery, eight counts of sexual battery by an authority figure, and seven counts of incest. The trial court sentenced the defendant to forty-two years in prison; because the defendant was ordered to serve the full sentence on the child rape convictions and because two of the child rape sentences were imposed consecutively, the defendant would serve at least forty years in prison:

Column 1	Column 2 (concurrent to Column 1)
Count 1, Rape of a Child: 20 years Consecutive to Count 2, Rape of a Child: 20 years	5 Counts, Rape of a Child, (concurrent): 20 years Consecutive to 7 Counts, Rape (concurrent): 8 years Consecutive to 7 Counts, Aggr. Sex Battery (concurrent): 8 years Consecutive to 8 Counts, Sex Batt. Auth. Fig. (concurrent): 3 years Consecutive to 7 Counts, Incest (concurrent): 3 years
Total Sentence: 40 years	Total Sentence: 42 years

The defendant appeals his convictions, arguing that the trial court erred in limiting the defendant's ability to question the victim about her prior sexual history, and that the court erred in allowing irrelevant and prejudicial testimony, in the form of rebuttal testimony by the victim's mother after the close of the defendant's case. After reviewing the record, we conclude that the trial court's actions were proper in both instances and affirm the judgments of the trial court.

STANDARD OF REVIEW

The admission of evidence at trial is entrusted to the broad discretion of the trial court. As such, the trial court's ruling on the admission of evidence may only be disturbed upon a showing of an abuse of discretion. State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004) (citing State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997)). The trial court's exercise of its discretion may not be reversed on appeal unless the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

ANALYSIS

Tennessee Rule of Evidence 412: The Rape Shield Law

The defendant contends that he was denied a right to a fair trial because the trial court erred in limiting the cross-examination of the victim regarding specific instances of her prior sexual conduct, pursuant to Rule 412 of the Tennessee Rules of Evidence. We disagree.

The Tennessee Rules of Evidence establish specific guidelines for admitting evidence of a victim's sexual behavior. According to the Advisory Commission Comments to Rule 412, these guidelines have been established to maintain "a balance between the paramount interest of the accused in a fair trial and the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy." The rule states, in pertinent part:

(c) Specific instances of conduct. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

...

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved

in such a manner as to lead the defendant reasonably to believe the victim consented.

Tenn. R. Evid. 412(c)(1) and (4).

Before evidence of specific instances of a victim's sexual behavior may be admitted at trial, the accused must file a written motion ten days prior to trial, accompanied by an offer of proof describing the specific evidence and the purpose for introducing it. Tenn. R. Evid. 412(d)(1). After notice has been given, the trial court must conduct a jury-out hearing to determine whether the evidence is admissible. *Id.* § (d)(2). If the defendant wishes to introduce the evidence for purposes of exhibiting the victim's knowledge of sexual matters, as the defendant did here, the trial court must decide (1) whether the evidence is relevant to the issue of knowledge of sexual matters and (2) whether the probative value of the evidence outweighs the risk of unfair prejudice to the victim. *Id.* § (d)(4). "[T]he evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined." *Id.*

Here, the defendant properly filed a Rule 412(d) motion. At the pre-trial hearing, the defendant stated that he only sought to introduce the victim's sexual history at trial to explain her knowledge of sexual activities, as per Rule 412(c)(4)(ii). The trial court's ruling regarding the evidence, that the defendant could ask the victim whether she had engaged in certain sexual activity and whether these activities occurred before or after the incidents involving the defendant, but that the defendant could not ask the victim about the frequency of her other activities or the names of her other sexual partners, was appropriate. *See State v. Steven Otis Nicely*, No. 03C01-9805-CR-00174, 1999 WL 826029, at *7 (Tenn. Crim. App. Oct. 18, 1999).

The defendant claims that the trial court's limitations on his ability to cross-examine the victim denied him his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, but this issue is without merit. The United States Supreme Court has noted that "the main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (citations and internal quotations omitted) (emphasis in original). However, as our court noted in *Nicely*, the Supreme Court has held that "[T]he confrontation clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense counsel might wish.'" *Nicely*, 1999 WL 826029, at *7 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (citation omitted)). The trial court in the instant case permitted the defendant to ask the victim questions that enabled the jury to gain an effective understanding of the victim's knowledge of sexual matters, as was the defendant's intent, without denying the defendant his right to a fair trial or unduly degrading or embarrassing the victim. Finding no abuse of discretion by the trial court, we find this issue to be without merit.

Tennessee Rules of Evidence: Relevance and Bias

The defendant next argues that the trial court committed error by allowing the victim's

mother to testify about Harrison's statements in the elevator. According to the defendant, the statements were irrelevant and highly prejudicial to the defendant. We find that the statements were relevant and not unduly prejudicial, and that the trial court properly admitted the statements as evidence of Harrison's bias in favor of her son and her prejudice against the victim and her mother.

The Tennessee Rules of Evidence state that evidence must be relevant to be admitted at trial. Tenn. R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The Rules of Evidence also permit a party to "offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616. This court has recognized the importance of Rule 616; "The feelings that a witness has with regard to a party or issue are an important factor for the trier of fact to consider in assessing the weight to be given to the witness's testimony." State v. Williams, 827 S.W.2d 804, 808 (Tenn. Crim. App. 1991). However, any relevant evidence may be excluded by the trial court if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403.

While the defendant claims that the disputed testimony was irrelevant to the ultimate issue of his guilt or innocence, the evidence was relevant to establishing the pro-defendant bias and prejudice against the victim's family on the part of Harrison, the defendant's mother. The testimony of the victim's mother regarding Harrison's statements concerning the victim's family makes the facts of Harrison's bias and prejudice more likely than they would be absent the testimony. As such, they are relevant for purposes of Rule 401. And while the state admits that any evidence that calls into question the bias of a defense witness causes prejudice against the defendant, it argues that the level of prejudice evident in the victim's mother's testimony does not rise to the level of "unfair," as is required by the Rules of Evidence. We agree.

Our court has held that unfairly prejudicial evidence is evidence with a primary purpose of eliciting emotions of "bias, sympathy, hatred, contempt, retribution, or horror." State v. Collins, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998). The testimony by the victim's mother was not designed to stir up these emotions. Rather, her testimony contained prejudice "naturally flow[ing] from all admissible evidence [that] is intended to persuade the trier of fact." State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995). Her testimony was damaging to the defendant, but "the mere fact that evidence is particularly damaging does not make it unfairly prejudicial." State v. Gentry, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993). In light of our previous holdings, we conclude that the trial court did not abuse its discretion in admitting the testimony of the victim's mother regarding Harrison's statements.

CONCLUSION

_____ The trial court did not abuse its discretion in limiting the scope of the defendant's questions regarding the victim's sexual history, and it did not abuse its discretion in admitting the testimony of the victim's mother regarding threatening statements made by the defendant's mother. As such,

the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE